Dynamic Federalism and the Concept of Preemption

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Some notion of preemption is inherent in the concept of a federal system. Alexander Hamilton, the recognized spokesman for a potent national government, considered this to be axiomatic. What is so simple and fundamental in theory, however, is extremely difficult to put into practice. James Madison placed this issue among the most difficult problems confronted by the drafters of the Constitution.

1. No definition of the word "preemption" will be attempted here. In English law, preemption was the right of the Crown to purchase its necessaries before all others. W. Blackstone, Commentaries 287. The term in this country originally referred to the right of a settler on government land to purchase it at a fixed price in preference to all others. Nix v. Allen, 112 U.S. 129 (1884); cf., Henn, Handbook of the Law of Corporations §§ 127, 175 (1970). This writer has used the term previously in reference to the right of the citizen to obey the commands of his conscience in preference to those of the state. See, Freeman, Moral Preemption Part I: The Case for the Disobedient, Symposium on Preemption, 17 Hastings L.J. 425 (1966). Today the word is used to describe the legal effect of the federal government's power to exclude a state from an area of legislation, or the constitutional impotency of the states to intrude into an area of legislation.

2. "If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy. . . . Hence we perceive that the clause which declares the supremacy of the laws of the Union . . . only declares a truth which flows immediately and necessarily from the institution of a federal government." The Federalist No. 33, at 204-05 (Mentor Book ed. 1961) (emphasis in original).

3. "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. . . .

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments." The Federalist No. 37, at 26-227 (Mentor Book ed. 1961).
Today, as the emphasis in government shifts to the international scene and even internal matters take on a national rather than local dimension, the need to understand and define the basic concept of federalism becomes paramount. A dynamic federalism would seem to be demanded. Where to draw the line between federal and state authority will therefore remain one of the pressing problems of the day in such areas as education (including financial support and desegregation), ecology and pollution abatement, women's and minorities' rights, welfare, and urban reclamation. Proposals for the sharing of federal revenues with the states are fertile grounds for conflict between the federal and state systems, as well.

At the gateway of our discussion, we are met by the ever expanding doctrine of preemption. It is not the purpose of this article to exhaustively discuss or even to cite the innumerable cases and articles on the subject of preemption. It is submitted that these are so hopelessly confused,4 and that the doctrine is so often used in place of more logically available arguments, that they provide little guidance for our analysis. We prefer instead to examine various sources of federal preclusion of state action and to analyze those usable rules that have been developed in certain preemption cases. We will pass over other cases, decided as preemption issues, which more properly could have been faced under other rules, e.g. "undue burden" on interstate commerce. From this hopefully will come a more clear, more sound basis for delineating the proper context of a doctrine of federal preemption in a dynamic federalism. The possible use of the doctrine of preemption as a tool in the line-drawing process in relation to current problems can then be discussed.

It seems to this author that the Supreme Court has not yet faced the question of the true constitutional place of preemption,5 that is, the need for coexistence in federalism, and has "by framing the

4. See note 7 and accompanying text, infra.

preemption question in terms of specific congressional intent . . . manufactured difficulties for itself.  

The Court has itself recognized the confusion produced by its own choice of preemption words.7

CONSTITUTIONAL PREEMPTION

One avenue by which the states may be precluded from acting in some given area is by the express command of the Constitution. The sole portion of the Constitution that specifically prohibits state action is article one, section ten,8 reinforced by the supremacy clause.9 In addition, the thirteenth through fifteenth amendments expressly prohibit certain acts. The fourteenth amendment has been the tool for striking down state laws lacking in substantive or procedural due process, and for requiring equality in areas in which it is becoming important that uniformity exists throughout the nation: education (segregation),10 voter power,11 criminal justice,12 welfare rights,13 and social and sexual discrimination.14 Of interest in light


7. In one leading case the Court noted: "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnotes omitted). See H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 84 (1939).

8. Paragraph one of article one, section ten provides: "No State shall enter into any treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts, or grant any Title of Nobility."

9. U.S. CONST. art.VI.


14. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Reitman v. Mulkey, 387 U.S.
of a number of "preemption" cases, and the suggestion we shall make later, are the provisions of the Constitution which permit state action subject to the regulation or consent of the Congress.

Together, these provisions establish a clear area of what might be called "constitutional supremacy." They "preempt" certain state action or make it subject to Congressional authority by the force of their own terms. Although the significance of these clauses cannot be overstated (as an examination of the fourteenth amendment cases alone will reveal), they are merely the starting point for the development of a doctrine of preemption. Obviously preemption cannot and should not be restricted solely to the cases where the Constitution specifically proscribes state action or expressly authorizes Congress to consent to state action.

It is believed that state action will run increasingly afoul of the authority vested solely in the national government, as expressed in the specific prohibitions of the Constitution listed above, particularly in the federal need for preserving a common citizenry, with common rights and without discrimination in the basis of sex, race, or other like characteristics. We shall treat later another area that might also be termed "constitutional" preemption, in which state action must be limited by reason of the inherent nature of federalism in the context of our modern world, in cases not covered by express constitutional requirements. Where express "constitutional supremacy" must by its nature be relatively static, a doctrine of inherent


15. Compare, e.g., Leisy v. Hardin, 135 U.S. 100 (1890) with In re Rahrer, 140 U.S. 545 (1891); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) and with Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946).

16. U.S. CONST. art. I, § 4 (relating to elections of senators and representatives); art. I, § 8 (relating to the militia); art. I, § 10 (relating to duties on imports and exports).

17. U.S. CONST. art. I, § 10 (relating to duties on imports, exports and tonnage, maintenance of troops, interstate and international compacts, and engaging in warfare).

18. For a persuasive showing of the argument of "constitutional supremacy" as applied to federal action in the area of the eighteen year old vote, see Forkosh, The Inability of Congress to Impinge on State Power to Set Electoral Age Qualifications, 47 CHI.-KENT L. REV. 83 (1970).

19. See text at notes 8-17, supra.
constitutional preemption should be openly dynamic. They coincide with each other as one fills the gaps left by the other. How important some sort of inherent preemption doctrine is to this plan can be seen from the early cases which hold that the mere express giving of a power in the Constitution to the federal government does not itself preempt the field from state action. Complete occupation of the field by the federal government is required for preemption. 20

THE SUPREMACY CLAUSE

The most common misconception found in the cases 21 and the literature 22 is that the doctrine of preemption must hinge on the supremacy clause. Hamilton himself seemed to suggest this as a basis in number thirty-three of The Federalist. 23

Hamilton's assertion must be read in light of his earlier statement that "the laws of the Confederacy as to the enumerated and legitimate objects of its jurisdiction will become the SUPREME LAW of the land. . . ." 24 A law enacted by Congress pursuant to one of its enumerated powers "could not legally be opposed or controlled." 25 This is the approach taken by some of the more recent supremacy clause cases that can be read as establishing an incompatibility doctrine. 26

However, Hamilton made it clear that the federal powers, although to be supreme when exercised, were intended to exist con-

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23. Quoted in note 2, supra.


DYNAMIC FEDERALISM currently with the states in many, if not all, of the enumerated areas. He recognized that this would create difficulties. Speaking of the concurrent jurisdiction to tax, he remarked that "this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other in a manner equally disadvantageous to both." He "hoped and presumed . . . that mutual interest would dictate a concert in this respect which would avoid any material inconvenience." Number thirty-four of The Federalist, although speaking only of taxes, is a classic exposition of the need for concurrent jurisdiction in many of these areas:

Nothing can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen. . . .

The supremacy clause was not intended to be a talisman for the determination of where the line between exclusive federal or state control of a field of legislation should be drawn; that was to be a product of history and the felt needs of the society under a dynamic or "emerging" constitution. To this degree it should make its contribution to a developing doctrine of preemption. The supremacy clause was intended, however, as a rule for decision when the concurrent powers came into conflict. Like the other provisions of the Constitution discussed earlier, it was inserted to ensure that certain specific situations would be dealt with in a certain way. It was not intended in 1789, and should not now be used, to resolve the fundamental questions of the partition of political power inherent in a federal system. Once the location of power was fixed, the supremacy clause was intended to determine the result of a conflict of action by two entities within the constitutional federation.

We cannot, therefore, accept the short-cut taken by some, making preemption depend on the supremacy clause or a doctrine of statutory construction. But the supremacy cases have done a serv-

29. Id.
31. See text at notes 8-18, supra.
32. "Continuity is provided by the supremacy clause . . . . This constitu-
ice to preemption despite their undue reliance on that constitutional clause. First, they have established three recognized tests applicable to preemption. They have also identified federal-state conflict as being of several kinds with different attitudes being shown by the Court as to each. But even these definitions and limitations do not seem to this author to adequately phrase the proper place of the supremacy clause in the doctrine of federal preemption. It is here suggested that since a mere constitutional grant of power to Congress does not preempt a field, and since "[f]ederal law is generally interstitial in nature... [and] rarely occupies a legal field completely," the most likely instance in which the federalist issue will be raised is when the federal government enters a


34. (1) Where compliance with both federal and state regulations is a physical impossibility federal law clearly controls. Union Bridge Co. v. United States, 204 U.S. 364, 399-401 (1907); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). (2) Where Congress has chosen to occupy only a limited field and yet an inference of negation of State action is sought to be drawn—here the Court will weigh the interests, taking into account the degree of interference and the clarity with which Congress has spoken. See Campbell v. Hussey, 368 U.S. 297 (1961). (3) Where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" federal law controls. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). (4) Where "both regulations can be enforced without impairing the federal superintendence of the field," state action is permissible. Florida Lime & Avocado Growers, Inc. v. Paul, supra, at 142; Hines v. Davidowitz, supra. The Court in Avocado went on to examine whether "the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Supra, at 142 (emphasis added).

35. See note 20, supra.

36. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953). "Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering them or supplanting them only so far as necessary for the special purpose." See note 20 supra.
field (partially or completely) already occupied by a state. The supremacy clause then becomes the tool by which state and federal action should be harmonized or by which the federal action can strike down that of the state. "Supremacy" seems a more accurate description than general preemption for this purpose. Nor is the argument impressive that by relying on preemption the Court shifts the odium for invalidating state law to Congress; in as true a sense "supremacy" also shifts the onus to Congress when it enters the field and shows its clear intent. Therefore, the supremacy clause remains an important criterion for a segment of the preemption field, and we should not hesitate to refer to it when applicable.\textsuperscript{37}

\textbf{PREEMPTION AS A RULE OF CONSTITUTIONAL FEDERALISM}

There is a recognized doctrine of dynamic federalism\textsuperscript{38} which may be summarized as follows: Although the Constitution confers powers on the national government, reserves powers to the states, and to some degree restricts both, such power definition is not the sole source for determining the proper federal-state relation at any given time. There are some problems which are of such a nature and dimension that they cannot adequately be handled by the states. These should be dealt with by the national government and by it only, state action being "preempted."\textsuperscript{39} It is believed that it is in this area that the doctrine of preemption must and will be developed.

It may properly be observed that the very first principle of American constitutionalism is federalism. This was and is a growing and emerging concept, progressing from the earlier confederation where all national laws operated only on the states (colonies) and

\textsuperscript{37} Use of the supremacy argument, resting on federal statutes, in addition to the constitutional theory outlined in notes 8-20 and accompanying text \textit{supra}, can be seen in Hamm v. City of Rock Hill, 379 U.S. 306 (1964); and Boynton v. Virginia, 364 U.S. 454 (1960).


\textsuperscript{39} Note 38 \textit{supra}. See note 2 and text accompanying notes 24-25, 30 \textit{supra}; test number three in note 33 \textit{supra}. 
national power was delegated by the states, to a fluid recognition that time would spell out the necessary breadth of powers that could be exercised adequately only by the federal government.\textsuperscript{40} It was this latter recognition on the part of the framers that led to the Constitution’s “necessary and proper” clause.\textsuperscript{41} It is somewhat interesting that no one has emphasized the degree to which Congress might derive power to preempt from that clause, even though the standard test for preemption as established in \textit{Rice v. Santa Fe Elevator Corp.}\textsuperscript{42} is one of congressional intent: “The question in each case is what the purpose of Congress was.”\textsuperscript{43}

It is submitted that the Supreme Court abdicates its duty as arbiter of the federal system when it makes the test of preemption the intent of Congress, and no construction should be given to the necessary and proper clause which would diminish even further the Court’s function in allocating power in the federal system. First, it is questionable whether the action of Congress should be allowed to conclusively preclude state action in any given area, unless that preclusion is justified in terms of modern federalism. It is equally doubtful whether Congress should have the sole power to decide to preclude or not preclude. The framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the line to be drawn:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution \ldots\textsuperscript{44}

Undoubtedly part of the reason behind the Court’s deference to Congressional intent is the limited fact-finding ability possessed by a judicial body. Jurisdiction in many areas intentionally had been made concurrent by the founders so that neither sovereignty would be hamstrung as the country developed. Changing demands upon the national government are best determined through its legislative

\textsuperscript{40} See \textit{The Federalist} No. 39, at 244-45 (Mentor Book ed. 1961) (James Madison).

\textsuperscript{41} \textit{U.S. Const.} art. I, § 8.

\textsuperscript{42} \textit{Rice v. Santa Fe Elevator Corp.}, 331 U.S. 218 (1947).

\textsuperscript{43} \textit{Id.} at 230.

\textsuperscript{44} \textit{The Federalist} No. 39, at 245-46 (Mentor Book ed. 1961) (James Madison).
fact-finding process. But the opposite is also true: the needs of the states are best determined by them. Congress' wishes, as to where the dividing line will be drawn, should be given great weight, but the first of the Court's standard Rice tests of preemption only begs the question: Is the scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it?" 45

More nearly proper is the second test set forth in Rice: whether the act of Congress "may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." 46 This approaches the ultimate question that must be decided by the Court as a matter of federal constitutional law and not as a matter of statutory interpretation.

The real test to be used by federalism's arbiter would seem to be this: Is this the kind of field in which all activity on the part of the states should and may be precluded, and to what degree must the preclusion occur in light of Congressional findings that federal legislation is warranted? Such a test requires the Court first to clearly identify and weigh the federal and state interests at stake and to determine which should be paramount in light of the current local, national, and global situation. This decision would then have to be tested against and tempered by the extent to which Congress has manifested an intention to control the field (the pervasiveness of the federal scheme). Inferentially, the Court may be opening the door to this approach in the third test of Rice: the "object sought to be obtained by the federal law and the character of obligations imposed by it" 47 as determining whether the field should be controlled by the central government. Such an analysis requires the Court to make the decision it was meant to make: where the line will be drawn. It does not ignore, however, that the line cannot be drawn without due respect for the position of Congress on the matter.

47. 331 U.S. at 230 (emphasis added); Southern Ry. v. R.R. Comm'n., 236 U.S. 439 (1915).
It is clear that the Court's Rice tests and the one suggested here are essentially the same. They differ only in the manner in which they will be applied. The Court tends to direct its tests at the statutory scheme or questions of Congressional intent because in the past it has tied preemption to the supremacy clause. However, as was said earlier, the supremacy clause was intended as a rule for decision when the concurrent powers came into express conflict. When the doctrine of preemption is invoked the power will cease to be concurrent. Cases decided under the Court's approach may reach the same result in the short run. However, a more sound theoretical basis may make future cases in newer areas of the law easier to decide.

The distinction that should be drawn between the supremacy clause approach of the Court and preemption properly based on considerations of federalism can be illustrated by comparing Perez v. Campbell, a bankruptcy case, with several cases in the area of foreign relations. The state statute in Campbell provided that a discharge in bankruptcy of an automobile accident tort judgment would have no effect on the obligation of the judgment debtor to repay, at least insofar as enforced by the withholding of driving privileges. The issue properly to be decided was whether such a statute "opposed or controlled" section seventeen of the Bankruptcy Act. The purposes of the Bankruptcy Act are twofold: to provide debtors with a new lease on their economic lives and to divide the debtor's assets equitably amongst his creditors. The state statute served to defeat both of these objectives and hence was invalid by virtue of the supremacy clause. This decision means only that a state cannot validly enact this kind of statute regarding judgment creditors and driver financial responsibility. The case spoke in terms of preemption, and thereby seemed to go well beyond what

48. See text at note 31 supra.
51. Supra note 25 and accompanying text.
the Court needed to decide. A holding of preemption would mean that a state could not pass any law regarding judgment creditors and/or financial responsibility, a question the Court expressly ruled was not before it for decision.

Similarly, criticism can be leveled at the use of "preemption" in the interstate commerce and labor cases, where so much of the law of preemption has been developed. By using "preemption," with its implication that the whole field is federally appropriated, rather than "undue burden," which implies joint power while emphasizing supremacy of federal authority, preclusion of state action may have been forced when in fact some form (but not that of the statute under review) might be good federalism.\(^5\) This author believes that much of the confusion in the economic regulation cases, from *Campbell v. Hussey*\(^6\) to the *Avocado* case,\(^7\) could have been avoided if conflict rather than preemption language had been used.

Cases in the field of foreign affairs and national security seem to show an application of the doctrine of preemption closer to that for which we argue. This may be seen from the *Hines*,\(^8\) *Nelson*\(^9\) and *Zschernig*\(^0\) cases.

*Hines v. Davidowitz* involved the 1939 Pennsylvania Registration Act. That statute required aliens over seventeen to register yearly,

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The importance of this shift to "pre-emption" can be seen from the fact that there were over fifty interstate commerce and labor "pre-emption" cases in the district and circuit courts in 1970-71.


58. Hines v. Davidowitz, supra note 34.


60. Zschernig v. Miller, supra note 50.
provide prescribed information, pay a one dollar fee, carry an identification card, and exhibit the card on demand of police and other officials. It provided for fine and imprisonment for violation. The federal 1940 Alien Registration Act required registration of persons over thirteen, fingerprinting, detailed information, secrecy of federal files except as provided by the Attorney General, and did not require the carrying or exhibition of a registration card. Only willful failure to register was criminal. The Court went far toward considering the field of foreign affairs within federalism as automatically one of national supremacy, though it buttressed its argument by saying that at least Congress could complete the preemption and had done so here:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court. ... 61

[1]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. ... 62

The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering ... whether supreme federal enactments preclude enforcement of state laws on the same subject. ... 63

Whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable. 64

A case properly suited for application of the true preemption doctrine was Pennsylvania v. Nelson. 65 Nelson, an admitted leader of the Communist Party in Pennsylvania, had been convicted of violation of that state's sedition act. His appeal to the Supreme Court was squarely on the federalism question: Is the area of sedition a realm in which the federal government should have control exclusive of the states? 66 But the Court backed off the path charted in Hines and ended with a weak decision. 67 Mr. Justice Warren, writ-

61. 312 U.S. 52, 62 (1940).
62. Id. at 68.
63. Id. at 70.
64. Id. at 73.
67. It is not to be denied that the Court was influenced by the strong states' rights forces, the opposition of the Attorney General, and even the willingness of
ING for the Court, reversed the conviction on the ground that the Smith Act "superseded" Pennsylvania law. He first summarized the provisions of the three major federal acts relating to subversion: the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954. Applying the "pervasive character" test, he concluded that these statutes "evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it."\textsuperscript{68}

Mr. Justice Warren then went on to note that Communist activities were regarded as part of a world conspiracy, and that federal interest in sedition activities was part of the national government's program to strengthen the nation's defenses against external aggression: the Federal Bureau of Investigation and the Central Intelligence Agency had been given responsibility for intelligence concerning Communist seditious activities. He noted that the Constitution required the national government to "provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government."\textsuperscript{69} Such an analysis might suggest that the opinion was headed for the constitutional federalism position, but Warren returned to the supremacy theme to conclude that since Congress had chosen to act decisively to carry out these requirements on a national scale, the states were thereby precluded from exercising any concurrent power.

Justice Warren's third rationale was another somewhat strained attempt to invoke the supremacy clause. Statements by President Roosevelt and J. Edgar Hoover were cited to demonstrate that the federal government had urged the states not to interfere with federal action in this area. An extensive discussion of the dangers to civil liberties to be found in state sedition statutes and the lack of successful prosecutions for sedition by local or state governments was offered supposedly to show a potential conflict with the federal program. These arguments under the supremacy clause are weak be-

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\textsuperscript{68} Supra note 65, at 504.

\textsuperscript{69} Supra note 65, at 505.
cause they show not “opposition or conflict” with a federal law; rather they show possible inconvenience to federal enforcement action and poor draftsmanship on the part of the states (which are hardly relevant to a determination of whether the states may act at all).

Primary emphasis upon the wishes of Congress made the Nelson decision open to attack on several grounds and diminishes its value as a preemption case. For example, the “pervasive scheme” of Congress’ argument was countered by Mr. Justice Reed for the dissent on the grounds that Congress was aware of the plethora of state anti-subversion statutes. The Justice Department’s brief specifically stated that there was no actual conflict present in two systems of regulation: “The administration of the various state laws has not . . . embarrassed, or impeded the enforcement of the Smith Act.”

Since preemption is a function of federalism, it is submitted that the case should have been decided on federal constitutional grounds. A proper analysis might go as follows: Communism is the state politics of a major world power and the problem of subversion is internationally a very sensitive area. Foreign affairs is the province only of the nation, not the states, as only the federal government can deal with foreign nations. Only Congress can raise and support the army necessary to fulfill the federal government’s constitutional duty to provide for the common defense. That defense can have two fronts, combatting external, overt aggression, and preventing takeover from within. The Constitution requires the federal government to protect the states against invasion and domestic violence and to guarantee them a republican form of government. “Subversion” is thus so closely tied to the most crucial and clear national powers that the field is, by its nature, preempted from the states. Practically speaking as well, the federal government is better suited to deal with Communist activity with its global or national orientation.

The result of the Court’s approach and that which we suggest may well be the same in the Nelson case. However, the approach set forth here allows the Court to develop rules for deciding the questions of power inherent in a federal system confronting a changing

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It is probable that the ultimate goal should be federal power, perhaps with state cooperation allowed and encouraged through consent given by Congress.

Zschernig v. Miller has been little noted by the writers but seems to rectify many of the ambiguities left by Nelson. In Zschernig there was no federal statute involved and the only relevant federal treaty had been construed by the Court as not applicable to the type of personal property in question. Nevertheless, the Court struck down an Oregon statute limiting inheritance of personal property by non-resident aliens to those from countries that grant reciprocal rights to United States citizens "without confiscation, in whole or in part." The Court pointed out that under such state statutes probate courts:

have launched inquiries into the type of governments that obtain in a particular foreign nation—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

According to the Court, this amounted to "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and to Congress." The clear result of this case is that

72. Mr. Justice Warren carefully described what Nelson did not affect: "The decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. . . . Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction, as was done under the Eighteenth Amendment and the Volstead Act. . . . Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence. . . . Nor does it prevent the State from prosecuting where the same act constitutes both a federal. . . and a state offense. . . ." Pennsylvania v. Nelson, supra note 65, at 500. Perhaps it is preoccupation with these extraneous problems that inhibits the Court from utilizing a doctrine of pre-emption founded squarely on federalism. There should be no such reticence. Pre-emption problems will rarely arise in the absence of some federal legislation. See note 36 and accompanying text, supra; but see text at note 74, infra. Pre-emption as it has been developed here is not called into play in cases of "constitutional pre-emption" which includes cases of explicit concurrent jurisdiction. See text at notes 8-20, supra. And Justice Warren's last concern ignores what is to be pre-empted: state control of sedition, not bombing or assassination.

73. See text at notes 54-58, supra.

74. Supra note 50.

75. Supra note 50, at 433-34. For a recent case on a similar problem, see Shames v. Nebraska, appeal docketed, No. 70-143, May 3, 1971.
preemption is not just a question of Congressional intent; rather it is a function of the proper recognition of where certain subjects are placed in the federal system.

We are suggesting here that this same approach should be employed on many subjects, in addition to foreign affairs, which in the dynamics of today must be dealt with by the federal government if they are to be handled adequately.

CONSENT AND FEDERAL-STATE COOPERATION

One of the concerns expressed by Chief Justice Warren in the Nelson case was that methods of cooperation between the federal and state governments should be preserved. That is certainly a proper component of federalism, but the way to provide it is not by illogical bending of the concept of preemption. Rather, even in preempted areas, the rule that the Congress can consent to state action furnishes the logical way out. The Constitution expressly recognizes such use of consent in article one, section ten: "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign power . . . ."76 There are numerous Supreme Court cases recognizing cooperation through Congressional consent in what have been treated as preemptable areas.77 A typical Congressional declaration is found in section 10(a) of the Taft-Hartley Act.78 The Court has recognized some of the advantages to such cooperation: state aid where federal staffs are inadequate, recognition of differences in different localities and state provided flexibility, allowance of special state concerns, flexibility of penalties provided, and choice between legislative and ad-

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DYNAMIC FEDERALISM

ministrative patterns. But, a warning is essential. The way out is not by a general abnegation of federal power, or a wholesale giving of consent to states' rights proponents as was attempted by some Congressmen immediately following the Nelson decision. The history of these attempts and the folly of the approach is well treated elsewhere. It is not surprising that the author there, as here, found that Nelson could be overturned by Congress "unless the Supreme Court should show some new-found disposition to treat federal power over sedition as constitutionally exclusive."

SOME AREAS OF LIKELY APPLICATION

At the beginning of this article we suggested a considerable list of proper areas for applying "federalism preemption" as it has been advocated herein. We are now beginning to see many of these problems appearing in the courts (with mixed success): sex-based state classifications constitutionally preempted, nuclear pollution standards, other air and noise pollution issues, automobile safety, control of contents of mail, revenue sharing, and many


81. Id. at 332.


86. See Miller v. California, probable jurisdiction noted, No. 70-73, March 29, 1971, argued before the Court and now awaiting decision.

87. See P-H FED. TAXES, Report Bulletin No. 3, ¶ 60,021. See also Symposium
others. Federal control and support of education and welfare becomes more imminent daily as the local real property taxes are nullified as a means of support, as bussing and desegregation are faced, and as welfare rights are broadened and state welfare acts are invalidated. 88

CONCLUSION

It has been argued that the Court has taken the wrong tack, although in part considering proper factors, in its development of a doctrine of preemption. This has resulted in an undesirable confusion in the law that will impede the proper determination of future cases in more dynamic federalism.

The first line of inquiry should be the principles of what we have called “constitutional preemption.” If they are not dispositive of the question, some cases can be decided on the basis of the supremacy clause. Only when these methods fail, and after the area of the law in question has evolved to the point where both the Congress and the Court have sufficient experience to make a judgment regarding national needs, should a preemption doctrine be brought into play. The most effective theory in an adequate preemption doctrine is dynamic federalism—a developing concept of when the needs of society can best or only be met by federal intervention. The ultimate obligation for deciding this question is on the Court; it ought not to abrogate its power to Congress. Once the line is drawn by the Court, however, the responsibility shifts to Congress to occupy the field set aside for it and to provide adequately for the fulfillment of the nation's goals. It has authority to use cooperation from the states, the decision when to do so belonging to itself. A proper doctrine of preemption has the advantage not only of resolving particular cases, but also of establishing the allocation of responsibility within our federal system.